STATE OF FLORIDA
AGENCY FOR HEALTH CARE ADMINISTRATION

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STATE OF FLORIDA, AGENCY FOR HEALTH CARE ADMINISTRATION,

Petitioner,

v.

NORTHPOINTE RETIREMENT COMMUNITY, INC., d/b/a NORTHPOINTE RETIREMENT COMMUNITY,

Respondent.
_____/

DOAH CASE NO. 09-3159
FRAES NOS. 2009001621
RENDITION NO.: AHCA-10-0507 -FOF-OLC

FINAL ORDER

This cause was referred to the Division of Administrative Hearings where the assigned Administrative Law Judge (ALJ), P. Michael Ruff, conducted a formal administrative hearing. At issue in this case is whether Respondent committed the violations alleged in the Administrative Complaint and, if so, what penalty should be imposed. The Recommended Order dated January 29, 2010, is attached to this Final Order and incorporated herein by reference.

RULING ON EXCEPTIONS

Both Petitioner and Respondent filed exceptions to the Recommended Order. Petitioner also filed a response to Respondent's exceptions.

In determining how to rule on the exceptions and whether to adopt the ALJ's Recommended Order in whole or in part, the Agency for Health Care Administration ("Agency" or "AHCA") must follow section 120.57(1)(*l*), Florida Statutes, which provides in pertinent part:

> The agency may adopt the recommended order as the final order of the agency. The agency in its final order may reject or modify the conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction. When rejecting or modifying such

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> conclusion of law or interpretation of administrative rule, the agency must state with particularity its reasons for rejecting or modifying such conclusion of law or interpretation of administrative rule and must make a finding that its substituted conclusion of law or interpretation of administrative rule is as or more reasonable than that which was rejected or modified. Rejection or modification of conclusions of law may not form the basis for rejection or modification of findings of fact. The agency may not reject or modify the findings of fact unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law. . . .

§ 120.57(1)(*l*), Fla. Stat. Additionally, "[t]he final order shall include an explicit ruling on each exception, but an agency need not rule on an exception that does not clearly identify the disputed portion of the recommended order by page number or paragraph, that does not identify the legal basis for the exception, or that does not include appropriate and specific citations to the record." § 120.57(1)(k), Fla. Stat.

It is the sole prerogative of the Administrative Law Judge (ALJ) to consider the evidence, resolve conflicts in the evidence, judge the credibility of witnesses, draw permissible inferences from the evidence, and reach ultimate findings of fact based on the competent, substantial evidence of record. The Agency may reject an ALJ's findings only where there is no competent, substantial evidence from which those findings can reasonably be inferred. See Heifetz v. Dep't of Bus. Reg., 475 So.2d 1277, 1281 (Fla. 1st DCA 1985); Belleau v. Dep't of Envt'l Protection, 695 So.2d 1305 (Fla. 1st DCA 1997); Strickland v. Fla. A&M Univ., 799 So.2d 276, 278 (Fla. 1st DCA 2001). The Agency is not authorized to substitute its judgment for that of the ALJ by taking a different view of or placing greater weight on the same evidence, re-weighing the evidence, judging the credibility of witnesses, or otherwise interpreting the evidence to fit its desired ultimate conclusion. See Prysi v. Dep't of Health, 823 So.2d 823, 825 (Fla. 1st DCA 2002); Strickland, 799 So.2d at 279; Schrimsher v. Sch. Bd. Of Palm Beach County, 694 So.2d

856, 860 (Fla. 4th DCA 1997); Heifetz, 475 So.2d at 1281; Wash & Dry Vending Co. v. Dep't of Bus. Reg., 429 So. 2d 790, 792 (Fla. 3d DCA 1983); D'Antoni v. Dept. of Envtl. Prot., 22 F.A.L.R. 2879, 2880 (DEP, May 4, 2000); Brown v. Criminal Justice Standards & Training Comm'n., 667 So.2d 977, 979 (Fla. 4th DCA 1996). Simply put, the Agency may not reject recommended findings of fact when the question turns on the weight or credibility of testimony by witnesses, when the factual issues are otherwise susceptible of ordinary methods of proof, or when the Agency may not claim special insight as to those facts, if the finding is otherwise supported by competent, substantial evidence. See McDonald v. Dep't of Banking & Fin., 346 So.2d 569, 579 (Fla. 1st DCA 1977); Gross, 819 So.2d at 1002; Schrimsher, 694 So.2d at 860; See also McGann v. Fla. Elections Comm'n, 803 So.2d 763, 764 (Fla. 1st DCA 2001) (concluding that an agency could not reject ALJ's finding of fact on ultimate issue of "willfulness" by recasting findings as a conclusion of law); Harac v. Dep't of Prof'l Reg., 484 So.2d 1333, 1337 (Fla. 3d DCA 1986) (stating that the agency was not permitted to substitute its findings for those of ALJ on issue of architect's "competency," even though the determination of design competency required specialized knowledge and experience, because it is not so unique as to defy ordinary methods of proof in formal adversarial proceedings).

In accordance with these legal standards, the Agency makes the following rulings:

Petitioner's Exceptions

In its sole exception to the Recommended Order, Petitioner takes exception to the ALJ's conclusions of law in Paragraph 66 of the Recommended Order, arguing that, contrary to the ALJ's conclusions, revocation of Respondent's license is warranted in this matter. In order to increase the penalty recommended by the ALJ, the Agency must "1) conduct a review of the complete record, and 2) state with particularity its reasons therefor in the order, by citing to the

record in justifying the action." Criminal Justice Standards & Training Comm'n v. Bradley, 596 So.2d 661, 664 (Fla. 1992). Petitioner has failed to do either of the two necessary steps. Petitioner offers no record citations in support of its argument, and merely regurgitates the ALJ's findings he cited to in support of his recommended penalty. Thus, the Agency must deny Petitioner's exception and adopt the ALJ's recommended penalty.

Respondent's Exceptions

In Exception No. 1, Respondent takes exception to the ALJ's finding of fact in Paragraph 11 of the Recommended Order that "[a] CNA note for that occasion reflects the incident, but Mr. Chaney was not told, and no call was made to him or his office." Respondent argues the finding was not based on competent, substantial evidence. However, the ALJ's finding is based directly on the testimony of James Chaney (See Transcript, Volume III, Page 366), which constitutes competent, substantial evidence. While there may be other competent, substantial evidence that contradicts Mr. Chaney's testimony, it is the purview of the ALJ, not the Agency, to weigh that evidence and make factual findings. The Agency is not permitted to re-weigh the evidence in order to make contrary findings. See Heifetz. Therefore, the Agency must deny Exception No. 1.

In Exception No. 2, Respondent takes exception to the findings of fact in Paragraph 12 of the Recommended Order, arguing that they were not based on competent, substantial evidence. Contrary to Respondent's argument, the findings of fact in Paragraph 12 of the Recommended Order were based directly on the testimony of James Chaney (See Transcript, Volume III, Pages 373-374), which constitutes competent, substantial evidence. While there may be other competent, substantial evidence that contradicts Mr. Chaney's testimony, the ALJ, not the Agency, has the final authority to weigh the evidence and make factual findings. The Agency

cannot re-weigh the evidence in order to make different factual findings. See Heifetz et.al supra. Therefore, the Agency must deny Exception No. 2.

In Exception Nos. 3 and 4, Respondent takes exception to the findings of fact in Paragraph 13 of the Recommended Order, arguing that the findings are not based on competent, substantial evidence. However, the findings of fact in Paragraph 13 of the Recommended Order are directly based on the testimony of James Chaney (See Transcript, Volume III, Pages 374-378), which constitutes competent, substantial evidence. "Credibility of the witnesses is a matter that is within the province of the administrative law judge, as is the weight to be given the evidence. The judge is entitled to rely on the testimony of a single witness even if that testimony contradicts the testimony of a number of other witnesses." Stinson v. Winn, 938 So.2d 554, 555 (Fla. 1st DCA 2006). Therefore, the Agency denies Exception Nos. 3 and 4.

In Exception Nos. 5 and 6, Respondent takes exception to the findings of fact in Paragraph 14 of the Recommended Order, arguing that the ALJ's findings are not based on competent, substantial evidence. Contrary to Respondent's argument, the findings of fact in Paragraph 14 of the Recommended Order are based directly on the testimony of James Chaney (See Transcript, Volume III, Pages 379-382), which constitutes competent, substantial evidence. "If an ALJ's finding of fact is based upon any competent substantial evidence, it cannot be disturbed by an agency." See Richard J. Shoop, The Finality of Recommended Orders, 81 Fla. Bar J. 5, 41 (May 2007) (emphasis in the original). Therefore, the Agency denies Exception Nos. 5 & 6.

In Exception No. 7, Respondent takes exception to the findings of fact in Paragraph 15 of the Recommended Order, arguing that the findings of fact are not based on competent, substantial evidence. Contrary to Respondent's argument, the findings of fact in Paragraph 15 of

the Recommended Order are based directly on the testimony of James Chaney (See Transcript, Volume III, Pages 384-392), which constitutes competent, substantial evidence. Therefore, based on the reasoning set forth in the rulings on Exceptions 1 – 6 supra, the Agency must also deny Exception No. 7.

In Exception No. 8, Respondent takes exception to the findings of fact in Paragraph 16 of the Recommended Order, arguing that the findings are not based on competent, substantial evidence. However, the findings of fact in Paragraph 16 of the Recommended Order are based directly on the testimony of James Chaney (See Transcript, Volume III, Pages 384-393), which constitutes competent, substantial evidence. The presence of other competent, substantial evidence that might contradict Mr. Chaney's testimony is irrelevant because the ALJ, not the Agency, has final authority to weigh such evidence and make the findings accordingly. See Heifetz. Therefore, the Agency denies Exception No. 8.

In Exception No. 9, Respondent takes exception to the findings of fact in Paragraph 25 of the Recommended Order, wherein the ALJ found that Sarah Hines was aware of Resident No. 1's hallucinations and that they had gotten more intense in December of 2008. Respondent argued that this finding was not based on competent, substantial evidence. Contrary to Respondent's argument, the finding was based directly on Ms. Hines' testimony (See Transcript, Volume IV, Pages 614-616), which constitutes competent, substantial evidence. Respondent is essentially re-arguing the case in front of the Agency. However, the Agency cannot position itself in the role of a fact-finder and re-weigh the evidence in order to make findings of fact that differ from those of the ALJ. See § 120.57(1)(*l*), Fla. Stat.; Heifetz. Therefore, the Agency denies Exception No. 9.

In Exception No. 10, Respondent takes exception to the findings of fact in Paragraph 26 of the Recommended Order, arguing that the findings are not based on competent, substantial evidence. Contrary to Respondent's argument, the findings are based directly on the testimony of Sarah Hines (See Transcript, Volume IV, Page 663), which constitutes competent, substantial evidence. Thus, the Agency is not permitted to alter them. See § 120.57(1)(*l*), Fla. Stat.; Heifetz. Therefore, the Agency must deny Exception No. 10.

In Exception No. 11, Respondent takes exception to the finding of fact in Paragraph 29 of the Recommended Order, wherein the ALJ found that Mohamad Mikhchi spoke to Resident No. 1's granddaughter and told her the resident would not be appropriate for placement at the facility if the frequency and intensity of the hallucinations continued. Respondent argued that this finding is not based on competent, substantial evidence. Contrary to Respondent's argument, the finding is directly based on the testimony of Mr. Mikhchi (See Transcript, Volume VII, Pages 1057-1058), which constitutes competent, substantial evidence. Respondent is asking the Agency to re-weigh that testimony, which the Agency is not permitted to do. See Heifetz. Therefore, the Agency must deny Exception No. 11.

In Exception No. 12, Respondent takes exception to the finding of fact in Paragraph 29 of the Recommended Order wherein the ALJ found that Ms. Hines told Mr. Mikhchi that Resident No. 1 was still hallucinating. Respondent argued the finding was not based on competent, substantial evidence. However, the finding was based directly on the testimony of both Ms. Hines (See Transcript, Volume IV, Pages 617-618) and Mr. Mikhchi (See Transcript, Volume VII, Pages 1052 and 1083), which constitutes competent, substantial evidence. Respondent is asking the Agency to re-weigh the evidence to make findings more favorable to its position, but

the Agency cannot do so. See § 120.57(1)(*l*), Fla. Stat.; Heifetz. Therefore, the Agency must deny Exception No. 12.

In Exception No. 13, Respondent takes exception to the finding of fact in Paragraph 31 of the Recommended Order wherein the ALJ found that "[t]he administrator acknowledged that he knew he had authority to increase monitoring and supervision of Resident No. 1," arguing that the finding is not supported by competent, substantial evidence. Contrary to Respondent's argument, the finding is based directly on the testimony of Mohamad Mikhchi (See Transcript, Volume VII, Pages 1080-1081), which constitutes competent, substantial evidence. Thus, the Agency is prohibited from rejecting or modifying it. See § 120.57(1)(*l*), Fla. Stat.; Heifetz. Therefore, the Agency denies Exception No. 13.

In Exception No. 14, Respondent takes exception to the findings of fact in Paragraph 33 of the Recommended Order, arguing that they were not based on competent, substantial evidence. However, the findings of fact in Paragraph 33 of the Recommended Order are based directly on the testimony of Dr. Jack Abramson (See Deposition of Dr. I. Jack Abramson at Pages 12-15), which constitutes competent, substantial evidence. Respondent is essentially asking the Agency to re-weigh the evidence in order to make findings more favorable to its position, which the Agency cannot do. See Heifetz. Therefore, the Agency must deny Exception No. 14.

In Exception No. 15, Respondent takes exception to ALJ's finding of fact in Paragraph 34 of the Recommended Order that "Resident No. 1 was inappropriate for placement in a[n] ALF environment, at least after late November or early December 2008," arguing that the finding was not based on competent, substantial evidence. However, the finding is based directly on the testimony of Dr. Jack Abramson (See Deposition of Dr. I. Jack Abramson at Pages 14-15),

which constitutes competent, substantial evidence. Thus, the Agency cannot reject or modify the finding. See § 120.57(1)(*l*), Fla. Stat.; Heifetz. Therefore, the Agency denies Exception No. 15.

In Exception No. 16, Respondent takes exception to the finding of fact in Paragraph 36 of the Recommended Order wherein the ALJ found that "There was insufficient communication, as shown by the above findings of fact," arguing that the finding was not based on competent, substantial evidence. However, the ALJ's finding is based on the findings of fact in Paragraphs 11, 14, 15, 16 and 25 of the Recommended Order, which, in turn, are based on competent, substantial evidence. See the rulings on Exception Nos. 1 and 5-9 supra. Therefore, the Agency denies Exception No. 16.

In Exception No. 17, Respondent takes exception to the finding of fact in Paragraph 37 of the Recommended Order wherein the ALJ found that "[t]hus [Dr. Abramson] believes discharge of Resident No. 1 to another more appropriate skilled nursing facility was appropriate because of her delusional and hallucinatory state." Respondent argues that this finding is not supported by competent, substantial evidence because Respondent's facility is not a skilled nursing facility. However, Respondent is attempting to obfuscate the ALJ's finding. It is clear that the ALJ was finding that Dr. Abramson believed Resident No. 1 should have been discharged to a skilled nursing facility, which was a more appropriate placement given the resident's delusional and hallucinatory state. Additionally, the ALJ's finding is based directly on the testimony of Dr. Abramson (See Deposition of I. Jack Abramson at Pages 22-30), which constitutes competent, substantial evidence. Thus, the Agency cannot disturb the ALJ's finding. See § 120.57(1)(*l*), Fla. Stat.; Heifetz. Therefore, the Agency denies Exception No. 17.

In Exception No. 18, Respondent takes exception to the findings of fact in Paragraph 39 of the Recommended Order wherein the ALJ found that Respondent was informed that Mr.

Chaney and the family had scheduled a psychiatric evaluation for Resident No. 1 in early January of 2009. Respondent argues that these findings are not based on competent, substantial evidence. Contrary to Respondent's argument, the findings are based directly on the testimony of Mr. Chaney (See Transcript, Volume III, Pages 495-496), Melinda Palmer (See Transcript, Volume IV, Pages 524-525) and Mr. Mikhchi (See Transcript, Volume VII, Page 1077), which constitutes competent, substantial evidence. Thus, the Agency is prohibited from rejecting or modifying them. See § 120.57(1)(*l*), Fla. Stat.; Heifetz. Therefore, the Agency denies Exception No. 18.

In Exception No. 19, Respondent takes exception to the finding of fact in Paragraph 40 of the Recommended Order wherein the ALJ found that Respondent could have provided a higher level of supervision for Resident No. 1 until a placement decision and psychiatric evaluation could be completed. Respondent argues the finding is not based on competent, substantial evidence. However, the finding is based directly on the testimony of Dr. Abramson (See Deposition of I. Jack Abramson at Pages 29-34), which constitutes competent, substantial evidence. Thus, the Agency cannot reject or modify the finding. See § 120.57(1)(*l*), Fla. Stat.; Heifetz. Therefore, the Agency denies Exception No. 19.

In Exception No. 20, Respondent takes exception to the finding of fact in Paragraph 41 of the Recommended Order wherein the ALJ found that Dr. Abramson's opinion that the death of Resident No. 1 was preventable and could have been avoided with added interventions was credible, persuasive and accepted. The Respondent argues that this finding is not based on

competent, substantial evidence. The ALJ's finding is an ultimate finding[1] based on his weighing of the testimony of Dr. Jack Abramson. Respondent is essentially asking the Agency to re-weigh the evidence, which it cannot do.

> If, as is often the case, the evidence presented supports two inconsistent findings, it is the hearing officer's role to decide the issue one way or the other. The agency may not reject the hearing officer's finding unless there is no competent, substantial evidence from which the finding may reasonably be inferred. The agency is not authorized to weigh the evidence presented, judge credibility of witnesses, or otherwise interpret the evidence to fit its desired ultimate conclusion.

Heifetz at 1281. Therefore, the Agency denies Exception No. 20.

In Exception Nos. 21-48, Respondent takes exception to the conclusions of law in Paragraphs 44-48, 54 and 56-65 wherein the ALJ concluded Respondent had committed violations of law. Case law has held that "an agency may not rely on its own expertise to reverse the administrative law judge's finding that a particular statute was not violated." Gross v. Dep't of Health, 819 So.2d 997, 1001 (Fla. 5th DCA 2002). Since these conclusions of law all deal with the issue of whether certain statutory provisions were violated, the Agency cannot overturn

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[1] The "ultimate finding" mentioned above

> [is that] "necessary to determine issues in [a] case" or the "final facts" derived from the "evidentiary facts supporting them." Id. (citing Black's Law Dictionary 1522 (6th ed. 1990)). Ultimate facts are also regularly described as "mixed questions" of law and fact, see, e.g., Antonucci v. Unemp. App. Comm'n, 793 So.2d 1116, 1117 (Fla. 4th DCA 2001), and must generally be made by the fact finder in an administrative proceeding because they are "necessary for proper review of administrative orders." Tedder, 697 So.2d at 902; see also San Roman v. Unemp. App. Comm'n, 711 So.2d 93 (Fla. 4th DCA 1998) (finding that whether "good cause" exists for unemployment compensation claimant to voluntarily leave work frequently involves mixed question of law and fact, and is an ultimate fact best left to the fact-finder); Heifetz v. Dep't of Bus. Reg., Div. of Alcoholic Beverages & Tobacco, 475 So.2d 1277 (Fla. 1st DCA 1985) (finding that "negligent supervision and lack of diligence are essentially ultimate findings of fact clearly within the realm of the hearing officer's fact-finding discretion.") (citations omitted).

Costin v. Fla. A&M Univ. Bd. of Trustees, 972 So.2d 1084 (Fla. 5th DCA 2008).

them. Additionally, the conclusions of law were based on the findings of fact, which, in turn, are based on competent, substantial evidence. See the rulings on Respondent's Exception Nos. 1-20 supra. They are also the result of the ALJ's weighing of the evidence presented in this matter, and the Agency is not permitted to re-weigh that evidence in order to substitute conclusions of law that are more favorable to Respondent. See Heifetz. Lastly, even if the Agency could overturn them, it finds that it could not substitute conclusions of law that are as or more reasonable than those of the ALJ. Therefore, the Agency denies Respondent's Exception Nos. 21-48.

FINDINGS OF FACT

The Agency adopts the findings of fact set forth in the Recommended Order.

CONCLUSIONS OF LAW

The Agency adopts the conclusions of law set forth in the Recommended Order.

ORDER

Based upon the foregoing, a $5,000 fine is hereby imposed for the violation enumerated in Count I of the Administrative Complaint; Count II of the Administrative Complaint is hereby dismissed; a $10,000 fine is hereby imposed for the violation enumerated in Count III of the Administrative Complaint; a $10,000 fine is hereby imposed for the violation enumerated in Count IV of the Administrative Complaint; a $10,000 fine is hereby imposed for the violation enumerated in Count V of the Administrative Complaint; and, in regards to the violations enumerated in Count VI of the Administrative Complaint, the Agency shall withhold revocation[2] of Respondent's license provided Respondent maintains complete compliance with the following conditions:

[2] The Agency agrees with the ALJ that revocation is legally available in this case, but in the interests of the population currently being served at the facility will forego revocation as long as the Respondent meets all the conditions suggested by the ALJ and further described and delineated in this final order.

- Respondent shall submit quarterly corrective action plans to the Agency for the next two years with the first one being due on or before June 30, 2010. Subsequent reports are due on September 30, 2010; December 30, 2010; March 31, 2011; June 30, 2011; September 30, 2011; December 31, 2011; and March 31, 2012. The Agency will specify the information it will need to see in the reports. Such reports shall be submitted to and must be received by: Agency Clerk, Agency for Health Care Administration, 2727 Mahan Drive, MS #3, Tallahassee, Florida 32308, on or before the date due. No extensions of time shall be granted for submission of these reports, and any late filed reports shall be grounds for the Agency to enter an immediate final order revoking Respondent's license pursuant to § 120.569(2)(n), Fla. Stat.
- Respondent shall submit to quarterly inspections or surveys of its facility by the Agency for two years from the date of rendition of this Final Order. The Respondent shall be responsible for any Agency costs associated with the conduction of these surveys as allowed for by statute. Any violations found, regardless of class, shall be grounds for the Agency to enter an immediate final order revoking Respondent's license pursuant to § 120.569(2)(n), Fla. Stat.
- Respondent shall timely pay the fines imposed by this Final Order. Unless payment has already been made, payment in the amount of $35,000 is now due from the Respondent as a result of the agency action. Such payment shall be made in full within 7 days of the date of rendition of this Final Order, and no extensions of time shall be granted. The payment shall be made by check payable to Agency for Health Care Administration, and shall be mailed to the Agency for Health Care Administration, Attn. Revenue Management Unit, Office of Finance and Accounting, 2727 Mahan Drive, Fort Knox

Building 2, Mail Stop 14, Tallahassee, FL 32308. Late payment of the fine shall be grounds for the Agency to enter an immediate final order revoking Respondent's license pursuant to § 120.569(2)(n), Fla. Stat.

DONE and ORDERED this 29 day of April, 2010, in Tallahassee, Florida.

THOMAS W. ARNOLD, SECRETARY
AGENCY FOR HEALTH CARE ADMINISTRATION

NOTICE OF RIGHT TO JUDICIAL REVIEW

A PARTY WHO IS ADVERSELY AFFECTED BY THIS FINAL ORDER IS ENTITLED TO JUDICIAL REVIEW, WHICH SHALL BE INSTITUTED BY FILING THE ORIGINAL NOTICE OF APPEAL WITH THE AGENCY CLERK OF AHCA, AND A COPY, ALONG WITH THE FILING FEE PRESCRIBED BY LAW, WITH THE DISTRICT COURT OF APPEAL IN THE APPELLATE DISTRICT WHERE THE AGENCY MAINTAINS ITS HEADQUARTERS OR WHERE A PARTY RESIDES. REVIEW PROCEEDINGS SHALL BE CONDUCTED IN ACCORDANCE WITH THE FLORIDA APPELLATE RULES. THE NOTICE OF APPEAL MUST BE FILED WITHIN 30 DAYS OF THE RENDITION OF THE ORDER TO BE REVIEWED.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Final Order has been furnished by U.S. or interoffice mail to the persons named below on this 29th day of April, 2010.

RICHARD J. SHOOP, Agency Clerk
Agency for Health Care Administration
2727 Mahan Drive, MS #3
Tallahassee, FL 32308
(850) 412-3630

COPIES FURNISHED TO:

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